SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000619-001 DT 02/04/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

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| AMERICAN REAL ESTATE ADVISORS LLC | ANDREW M HULL<br>GEORGE TACKER |
| v. | |
| KIMBERLY TODD (001)<br>JEAN TODD (001) | CARLTON C CASLER |
| | REMAND DESK-LCA-CCC<br>SCOTTSDALE JUSTICE COURT |

MINUTE ENTRY

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

American Real Estate Advisors, and Walter and Ludmila Kabat (hereinafter "Appellees") filed a forcible detainer action against Kimberly & Jean Todd (hereinafter "Appellants) for non-payment of rent in Scottsdale Justice Court; the action concerned July and August, 2002 rent. On August 29, 2002, the trial court held that: 1) July 2002 rent had been paid; 2) Appellants made a partial payment for August, 2002 rent, and Appellees accepted the partial payment; and 3) Appellants properly followed Arizona's self-help provision – A.R.S. §33-1363(A)[1] – after

[1] "Self-help for minor defects: If the landlord fails to comply with § 33-1324, and the reasonable cost of compliance is less than three hundred dollars, or an amount equal to one-half of the monthly rent, whichever amount is greater, the tenant may recover damages for the breach under § 33-1361, subsection B, or may notify the landlord of the tenant's intention to correct the condition at the landlord's expense. After being notified by the tenant in writing, if the landlord fails to comply within ten days or as promptly thereafter as conditions require in case of emergency, the tenant may cause the work to be done by a licensed contractor and, after submitting to the landlord an itemized statement and a waiver of lien, deduct from his rent the actual and reasonable cost of the work, not exceeding the amount specified in

Appellees failed to repair the Appellants' swimming pool despite repeated requests. The Scottsdale Justice Court dismissed Appellees' complaint, but failed to state whether the complaint was dismissed with or without prejudice. A formal judgment of the August 29th dismissal was not signed/entered until January 3, 2003.[2]

On August 30, 2002 Appellees served Appellants with another 5-day notice to pay (August 2002 rent) or quit. Appellees, using a new attorney, filed a second forcible detainer action in the Scottsdale Justice Court on September 20 and the trial was set for September 26, 2002. On the day of the trial in the second case, Appellees filed a Notice of Change of Judge and the case was transferred to the West Tempe Justice Court, where trial was set for October 25, 2002. At trial, Appellants made a Motion to Dismiss, but the motion was denied. At Appellees' request, the trial was continued to November 6, 2002. The trial court granted Appellants' leave to file a written Motion to Dismiss and directed Appellees to file a written response thereto. Appellants sent a copy of the Motion to Dismiss to the court and to Appellees on October 25, 2002. Appellees never filed a written response to Appellants' Motion to Dismiss. At the November 6, 2002 trial, the court denied Appellants' Motion to Dismiss, and found in favor of Appellees regarding the August 2002 rent, but not as to the October 2002 rent. The judgment for this second forcible detainer action was signed/entered on November 15, 2002. On that same day, Appellants filed a Motion to Reconsider and a Motion for a New Trial, but the court denied both motions. Appellants appealed the matter to this court. Both parties conceded that proceedings concerning the first forcible detainer action were still going on/yet to receive final judgment when the second trial began; the record shows that that the West Tempe Justice Court was aware of this as well. Consequently, the second forcible detainer action abated.[3] Hence, the trial court erred by failing to grant the Motion for Reconsideration or Motion for New Trial. Accordingly, I vacated the decision of the West Tempe Justice Court in Superior Court number LC2002-000717. Appellants' aforementioned Request for Final Judgment of the first forcible action is at the center of another appeal, which is now before this court.

On November 21, 2002, Appellants filed a Request for Final Judgment of the first forcible action, with the Scottsdale Justice Court. Appellees' attorney filed no response or objection. On December 26, 2002, Appellants filed a Motion for Summary Disposition and Notice of Lodging Form of Judgment. Again, Appellees' attorney filed no response or objection, and the trial court entered a judgment on January 3, 2003. Thereafter, attorney George Tacker, on Appellees' behalf, filed a Motion to Set Aside Judgment and Request for Sanctions against Appellants and their counsel. At the April 2, 2003 oral argument, the trial court set aside the

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this subsection.

[2] On November 21, 2002, Appellants filed a Request for Final Judgment of the first forcible action (August 29, 2002)

[3] An action pending in another court between the same parties, upon the same issue, causes the second action to abate [*Allen v. Superior Court of Maricopa County*, 86 Ariz. 205, 344 P.2d 163 (Ariz. 1959); *Sierra v. Perry*, 121 Ariz. 437, 590 P.2d 1383 (Ariz. 1979); *Davies v. Russell*, 84 Ariz. 144, 325 P.2d 402 (Ariz. 1958)].

January 3, 2003 judgment and assessed sanctions against Appellants and their attorney. Appellants bring the matter before this court, having timely filed a Notice of Appeal.

The first issue is whether attorney George Tacker properly and formally appeared on Appellees behalf before the Scottsdale Justice Court. Appellants contend that attorney George Tacker failed to submit a notice of appearance or substitution of counsel, thereby barring the trial court's consideration of the documents Mr. Tacker filed on Appellees' behalf. Appellees argue that this is a non-issue, for Appellants never raised this issuebefore the trial judge. An appellate court may not review an alleged error at trial where the appealing party fails to make a proper form of an objection, stating specifically the grounds therefore.[4] The purpose of the rule requiring that specific grounds of objection be stated is to allow the adverse party to obviate the objection and to permit the trial court to intelligently rule on the objection and avoid error.[5] The record shows that Appellants did raise this issue at the lower court, and the trial judge permitted Mr. Tacker to appear. However, allowing Mr. Tacker to proceed with filings of pleadings and appearing before the lower court without a formal order is a harmless error. In *Creach v. Angulo*,[6] the Arizona Supreme Court ruled:

> To justify the reversal of a case, there must not only be error, but the error must have been prejudicial to the substantial rights of the party. Furthermore, prejudice is not presumed but must appear from the record. Otherwise, the error is deemed harmless. Rule 61 of the Arizona Rules of Civil Procedure defines harmless error as follows: "No error or defect ... in anything done or omitted by the court or by any of the parties is ground for ... vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*" [emphasis mirrored]

The record is devoid of any proof of prejudice resulting from this error, thus the error is deemed harmless.

The second issue is whether there was a basis for assessing sanctions against Appellants and their counsel. The record is clear that Appellants' Request for Final Judgment was inaccurate and wholly misstated the outcome of the August 29, 2002 hearing, for it states:

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[4] *Montano v. Scottsdale Baptist Hospital, Inc.*, 119 Ariz. 448, 581 P.2d 682 (Ariz. 1978).
[5] *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 187 Ariz. 121, 927 P.2d 781, 11 IER Cases 971 (App. 1996).
[6] *Creach v. Angulo*, 189 Ariz. 212, 941 P.2d 224, 246 Ariz. Adv. Rep. 3 (Ariz. 1997).

> It is hereby ordered entering judgment with prejudice in favor of Defendants Kimberly Todd and Jean Todd and against American Real Estate Advisors. Defendants may apply for fees/costs in this Court or may seek fees/costs in a separate action.

I concur with the trial judge's finding that Appellants' counsel knew or should have known that the Request for Final Judgment falsely reflected the findings of the trial court on August 29, 2002. The trial judge stated that he signed this spurious form of judgment, believing it to be a judgment of a dismissal. The judgment was not dismissed with prejudice - it was simply dismissed. Appellants' counsel misrepresented these fundamental facts in his Request for Final Judgment. Accordingly, the sanctions imposed against Appellants and their counsel (jointly and severally) were appropriate. Further, I find that Appellants and their counsel were afforded adequate due process before the trial judge ordered sanctions against them, as they were both given an opportunity to call witnesses and explain their actions in the April 2, 2003 hearing, and Appellants' counsel filed a thirteen page response to Appellees' request for sanctions, wherein he introduced nearly thirty pages of exhibits defending against the pending sanctions.

The third issue Appellants raise is whether Appelles' Rule 60 motion was defective as matter of law. Appellants argue that the motion did not offer any type of meritorious claim. Rule 60(C) of the Arizona Rules of Civil Procedure states in part:

> On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Appellees' Motion to Set Aside was based on an alleged fraud being perpetrated upon the trial court, which is a claim recognized in both Rule 60(C)(1) and (3). This issue has been resolved by this court adversely to Appellants in the previous paragraph wherein this court determined

that Appellants and counsel misrepresented "fundamental facts" in their Motion for Final Judgment.

The fourth issue Appellants raise is whether Appellees' Motion for Sanctions was baseless. As addressed in the second issue, the trial judge properly found that Appellant's counsel knew or should have known that the Request for Final Judgment falsely reflected the findings of the trial court on August 29, 2002. The imposed sanctions were appropriate.

The fifth issue raised by Appellants is whether it was error to deny Appellants' Motion for Reconsideration. Appellants cursorily refer to error by the trial court in one sentence, but make no specific references to errors worthy of reconsideration. As Appellees correctly argue, "claimed errors not assigned will not be reviewed."[7]

The final issue concerns attorneys' fees and costs. As both parties correctly argue, because the written rental agreement between the parties included an attorneys' fees provision, Appellees are entitled to an award of attorneys' fees and costs incurred in this appeal.[8]

IT IS THEREFORE ORDERED affirming the decision of the Scottsdale Justice Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale Justice Court for all further, if any, and future proceedings, with the exception of attorneys fees and costs.

IT IS FURTHER ORDERED that counsel for the Appellees shall prepare and lodge a judgment consistent with this minute entry opinion, and lodge its application for attorneys fees and costs, no later than March 3, 2004.

[7] *Minton v. Industrial Commission of Ariz.*, 90 Ariz. 254, 258, 367 P.2d 274, 278 (Ariz. 1961).
[8] *Dalton v. McLaughlin*, 130 Ariz. 270, 635 P.2d 863 (App. 1981).